Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-897

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TEXAS EDUCATION AGENCY, (Austin Independent School District), *et al.*,

*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*, and DEBRA ESTELL OVERTON, *et al.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF IN OPPOSITION

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UNITED STATES OF AMERICA, et al., and DEBRA ESTELL OVERTON, et al.,

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On Petition For a Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

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BRIEF IN OPPOSITION

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Debra Estell Overton, et al., black plaintiffs-intervenors below,* respectfully request that the Court deny the petition for a writ of certiorari to review the Fifth Circuit's opinion.

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*/ Debra Estell Overton, et al., black and Mexican-American school children, are students in

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly found insufficient evidentiary support for a per se prohibition on the use of transportation of students in the first six grades as part of any desegregation plan to disestablish admitted de jure segregation of black students?

2. Whether on remand the court of appeals correctly reconsidered the evidence in light of Washington v. Davis, 426 U.S. 229 (1976), in reaching the conclusion that segregation of Mexican-American students resulted from acts of intentional racial discrimination by the public school district?

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*/ Cont'd
schools in the Austin Independent School District who have intervened through their parents or guardians. The instant brief in opposition is filed by black plaintiffs-intervenors. Mexican-American plaintiffs-intervenors have filed a separate brief in opposition.

The Petition for Certiorari incorrectly lists the National Association for the Advancement of Colored People and the Mexican American Legal Defense and Educational Fund as Respondents. Neither organization has ever been a party to this case in any of the courts below and neither is a respondent here. See Rule 21(4).



## STATEMENT OF THE CASE

### Prior Proceedings, 1970-1976

a. Austin I

This triethnic school desegregation action against the Austin Independent School District was originally filed August 7, 1970. The district court initially concluded that the school district had not discriminated against Mexican-American students, but that a dual system continued to exist as to black students. Pet. App. 124. A desegregation plan was approved that closed the black secondary schools, and left segregated elementary schools intact.

The court of appeals heard the "Austin I" appeal en banc. Six judges joined in a lead opinion that black students were unlawfully segregated, that the desegregation plan was inadequate, and that "the AISD has, in the choice of school site locations, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments, caused and perpetuated the segregation of Mexican-American students within the school system." 467 F.2d 848, 865-866, 870 (1972). Eight other judges joined only the result reached by the lead opinion.

b. Austin II

On remand, the district court again ruled that black students were unlawfully segregated, and ordered additional desegretation of the sixth elementary grade only. Pet. App. 94. The court again found no de jure segregation of Mexican-American students.

In 1976, in "Austin II," the Fifth Circuit affirmed that black students were subject to de jure segregation, and reversed the rulings that limited elementary level desegregation to the sixth grade and closed the black secondary schools. Pet. App. 51, 532 F.2d 380. The court also found that Mexican-American students were subject to unconstitutional de jure segregation on the basis of both the segregatory effects of a neighborhood school policy, and evidence of discriminatorily-applied policies relied on in Autin I. Pet. App. 70, 532 F.2d at 392.

c. Prior Petition for Certiorari

On December 6, 1976, the Court, per curiam, granted a petition filed by the district, vacated the judgment and remanded for reconsideration in light of Washington v. Davis, supra. Pet. App.



45, 429 U.S. 990 (1976).[1/]

Proceedings Below, 1976-1978 (Austin III)

After declining en banc consideration, the court of appeals restudied its two earlier decisions and the record ("Austin III"). The

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4/ Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, filed a concurring opinion that:

> "As suggested by this Court's remand premised upon Washington v. Davis, supra, the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.1/ That court also seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights.

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1/ "Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, e.g., United States v. Texas Education Agency, 467 F.2d 848, 865-869 (CA 5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controling effect to the case of neighborhood schools."

court reiterated that de jure segregation of black students was established. Pet App. 14, 564 F.2d 162. The opinion then discusses the impact of Washington v. Davis, supra, and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), on Austin II's reliance on a neighborhood school policy to show discriminatory intent to segregate Mexican-American students, and clarifies that Austin II was not solely based on that ground. Pet. App. 28-31, 564 F.2d at 169-170.

The court then set forth facts supporting the discriminatory segregation of Mexican-American students. The district's policies produced more racial and ethnic separation in the school than in the residential patterns of the district by resorting to a neighborhood school policy only when it would produce the maximum feasible separation of Anglos from Mexican-Americans, the establishing of specifically-designated "Mexican" schools just as the district established expressly "black" schools, unique gerrymandering of attendance zones, dual-overlapping zones otherwise used only for black-white schools, unusual school sit-



ing and capacity decisions (i.e., manipulating the design, location, and size of a school), racial assignment of faculty, and extensive use of portable classrooms to relieve overcrowding in Mexican-American schools instead of the permanent additions and new construction principally used in Anglo schools. Pet. App. 31-40, 564 F.2d at 170-174.

With respect to remedy, the Fifth Circuit remanded the case to the district court for a hearing on remedy pursuant to Dayton Board of Education v. Brinkman, 433 U.S 406 (1977). Rehearing en banc was denied again. Pet. App. 1, 579 F.2d 910.

## ARGUMENT

1. For eight years both courts below have consistently found--and no party disputes--that black students in Austin ISD are subject to continuing de jure segregation and entitled to relief. However, unlike most other school systems in the South, no constitutionally adequate means of disestablishing the dual system formally imposed by state statute has ever been framed. As

to Mexican-American students, Austin III is the third time in six years, the last time pursuant to specific remand for clarification, that the Fifth Circuit has determined that pervasive specific acts constitute de jure segregation. Unless the petition is denied, yet another school year will go by without adequate desegregation. Any delay would be especially anomalous for black students. For them, there has been delay upon delay, more frustrating because the controversies which have put off vindication of their constitutional rights are largely unrelated to the measures required for eliminating vestiges of prior statutory segregation.

2. As in the previous petition filed by the district, one of the questions presented is whether the district court erred in ruling out any transportation of elementary school children in the Austin school district younger than sixth grade, in order to eliminate the segregation of black students from white students. The finding of the Fifth Circuit that there was a complete lack of record support for the district court's per se prohibition is not appropriate for review, incorrect or clearly erroneous. See Pet.



App. 16-18, 564 F.2d at 164-165. The outright prohibition of all but the last elementary grade for purposes of transportation for desegregation, regardless of the circumstances, is contrary to law. See, e.g., Flax v. Potts, 464 F.2d 865, 869 (5th Cir. 1972). Moreover, the necessary factual record for deciding whether any transportation component of a specific desegregation plan is unsuitable on account of the age of students, numbers bused or distances travelled, is totally absent. The question is premature: the court below remanded all remedy questions to the district court for further hearing.

3. Fully six years after the last evidentiary hearing, the court of appeals has again correctly determined that Mexican-American students are subject to de jure segregation. The findings were first made in 1972 in Austin I, reiterated (albeit not without ambiguity as to its significance) in 1976 in Austin II and now again in Austin III in light of Washington v. Davis; and petitioners do not dispute that the record first compiled in six days of trial in 1971 and

supplemented in 12 days of further hearings in 1973 is complete on liability issues.

Petitioners mischaracterize the opinion and ignore clearly stated reliance on classic evidentiary indicia of "'current condition of segregation resulting from intentional state action,'" Washington v. Davis, supra, 426 U.S. at 240, quoting, Keyes v. School District No. 1, 413 U.S. 189, 205 (1973), arising from invidious application of school board policies. The evidence is neither novel nor remarkable, viz., structuring attendance zones or designating feeder schools on the basis of race, building a school to a certain size and in a certain location with a conscious knowledge that it would be a segregated school, and using mobile classrooms, drafting student transfer policies, transporting students, and assigning faculty and staff on racially identifiable bases, Keyes v. School District No. 1, supra, 413 U.S. at 201-202; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971). Pet. App. 31-40, 564 F.2d at 170-174. The findings derived from the principally documentary factual record, are both appropriate and correct. Reliance on such traditional cate-



gories of fact finding in school desegregation cases suffers from no lack of clarity, and raises no colorable claim that Washington v. Davis, supra, is either misapprehended or misapplied.

At this juncture, petitioners' request for review is no more than a request to review evidence and discuss specific facts, see United States v. Johnson, 268 U.S. 220, 227 (1925).

4. We also respectfully submit that there is no need to hold the petition pending Columbus Board of Education v. Penick, 583 F.2d 787 (6th Cir. 1978) cert. granted, 47 U.S.L.W. 3463 (January 8, 1979); Dayton Board of Education v. Brinkman, 583 F.2d 243 (6th Cir. 1978), cert. granted, 47 U.S.L.W. 3463 (January 8, 1979). The Fifth Circuit has for the third time in six years, the last time pursuant to specific directions, made findings which evidence unequivocal segregative intent; no purpose would be served by delaying a hearing on remedy.

"When the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound nondiscriminatory social policy,

discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences." Pet. App. 27, 564 F.2d at 168; compare Village of Arlington Heights, supra, 429 U.S at 467. This evidentiary test was applied to acts which were either expressly racial, e.g., the establishment of specifically-designated "Mexican" schools, or unusual departures from standard operating procedure in a variety of policies, each with avoidable and foreseeable discriminatory consequences. That these segregative acts were not well accepted or sound nondiscriminatory social policy is manifest, and Austin III perforce does not press the limits of any "foreseeable consequences" or other evidentiary test. The findings of fact are comparable to similar decisive findings in Swann and Keyes, and courts of appeals before[2/] and after Washington

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2/ See, e.g., Hart v. Community School Board, 512 F.2d 37, 50-51 (2d Cir. 1975).



v. Davis.[3/] The "sensitive inquiry" of evidence of intentional segregation, Village of Arlington Heights, supra, 429 U.S. at 266, therefore, raises no questions of general significance.

Moreover, in the Dayton and Columbus cases lower courts applied the remedial requirements of Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). In contrast, the Fifth Circuit remanded any consideration of remedy to the district court for further hearings. The posture of the case at this time necessarily permits no consideration of difficult questions concerning the relationship between constitutional violation and scope of relief.

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3/ See, e.g., Arthur v. Nyquist, 573 F.2d 134, 141-143 (2d Cir.), cert. denied, 47 U.S.L.W. 3215 (October 2, 1978); United States v. School District of Omaha, 565 F.2d 127, 128 (8th Cir.) cert. denied, 434 U.S 1065 (1977); NAACP v. Lansing Board of Education, 559 F.2d 1042, 1045-1049 (6th Cir.), cert. denied, 434 U.S. 997 (1977).

## CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

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